

ADVISORY OPINION NO. 90-74

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 20, 1990

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of a Candidate for City Council

OPINION SOUGHT

1. Whether it was a violation of the Act for a City Councilman to submit sealed bids to the City for the award of insurance contracts prior to September 30, 1989?
2. Whether it is a violation of the Act for a City Council candidate, if elected, to continue to submit sealed bids to the City for the award of insurance contracts?
3. Whether it would constitute a violation of the Act for the candidate, if elected to the City Council to continue to submit sealed bids to the City for the award of insurance contracts if the Councilman does not participate in council discussions of insurance matters and abstains from voting on such matters and notifies the council at large of his interest in the awarding of the contract?
4. Whether an exemption should be granted to the City to allow the Councilman to continue to submit sealed bids for the award of insurance contracts, if a violation is found?

OTHER FACTS RELIED UPON BY THE COMMISSION

The requestor is seeking an advisory opinion on behalf of his client. The client served as a City councilman for two terms ending 1986. For a number of years the former councilman has been a licensed insurance agent with an active clientele (owning 100% of the insurance agency). During the time he was a Councilman he submitted sealed bids along with others to provide various insurance protection programs for the City. He did not participate in Council discussions of the matter. On occasion his was the low bid and was accepted by vote of the Council. In all such votes he abstained, notifying the Council at large of his obvious interest in the contract award. Some of the awarded insurance from his term as Councilman are still in effect.

If the Commission finds that a violation of the Act exists, the **requestor** has submitted a written application to the Commission for an exemption citing excessive costs, since the City would be unable to accept the lowest bid for an insurance contract if the bid was submitted by the City Councilman.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-1-2(c) states in pertinent part that...the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code Section 6B-2-5(d)(1) states that no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract with the governmental body over which he or she has direct authority or with which he or she is employed: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, however, That nothing herein shall be construed to prohibit a member of the legislature from entering in a contract with any governmental body.

West Virginia Code Section 6B-2-4(w) states in pertinent part that...the provisions of this section shall apply to violations occurring after the thirtieth day of September, one thousand nine hundred eighty-nine...

West Virginia Code Section 6B-2-5(d)(2) states that in the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this section is an interest not exceeding ten percent of the partnership or the outstanding shares of a corporation...

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that...where the provisions of subdivisions (1) and (2) of this subsection would result...in excessive cost, undue hardship, or other substantial interference with the operation of a...municipality...the affected governmental body or agency may make a written application to the Ethics Commission for an exemption.

ADVISORY OPINION

1. The Ethics Act applies only to violations occurring after September 30, 1989. Therefore, the Commission is without authority to assess any actions occurring before that date.

2. & 3. An analysis of the facts presented and the pertinent statutory provisions of 6B-2-5(d)(1) and (2) follows:

a. If elected to the City Council, the Councilman would be an elected public official with direct authority and control over the awarding of public contracts.

b. As a licensed insurance agent who owns an agency, the councilman has more than a limited interest (more than 10% ownership) in the business entering into a public contract with the City.

c. For the purpose of this section "limited interest" is defined as an interest not exceeding ten percent of the agency.


d. Therefore, the Commission finds that it would be a violation of subsections 6B-2-5(d)(1) and (2) of the Act for a City Councilman's business to contract with the City without an exemption.

If the City Council candidate is re-elected and the City Council is granted an exemption by the Commission at some later date pursuant to subsection 6B-2-5(d)(3), the City Councilman should definitely seek to be excused from voting or recused from deciding on an issue that has become a conflict and such conflict has become personal (i.e. voting on the award of a public insurance contract to his insurance agency).

However, if the City Council is denied an exemption by the Commission, the Councilman can not continue to submit sealed bids for the award of insurance contracts although he does not participate in council discussions of insurance matters and abstains from voting on such matters and notifies the council at large of his interest in the awarding of the contracts.

4. The **requestor** has submitted a request for an exemption to the Commission, pursuant to subsection 6B-2-5(d)(3) citing excessive costs to the City. However, the Commission is unable to act upon this request for an exemption, since the Act requires that the request must be submitted by the **affected governmental body** and not by the affected public official.

Also, the request for an exemption is premature since the candidate is not a public official at this time.


Vice-Chairman